SUPREME COURT 11: 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. [redacted]1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS
and JOSEPH WOODS, Sheriff
of Cook County, Illinois,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS

MOTION OF REBECCA B. MADDEN FOR LEAVE TO FILE A BRIEF AMICUS IN SUPPORT OF PETITIONER.

BRIEF IN SUPPORT OF MOTION TO PARTICIPATE AS AMICUS CURIAE.

BRIEF OF REBECCA B. MADDEN AS AMICUS CURIAE IN SUPPORT OF PETITIONER.

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No. 344

WILLIAM C. WITHERSPOON,

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PEOPLE OF THE STATE OF ILLINOIS
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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS

MOTION OF REBECCA B. MADDEN FOR LEAVE TO FILE A BRIEF AMICUS IN SUPPORT OF PETITIONER.

Rebecca B. Madden respectfully moves for leave to file a brief amicus in support of the position of petitioner in this cause. Her own case is now pending in the Supreme Court of the State of Arizona. While there are other and additional substantial questions in her case in that court the question of the propriety of a death qualified jury is there clearly presented. Her case will thus probably be controlled by this case. The facts as to her case are a significant factual variation of the instant case which are necessary to a full consideration of the issue now before the Court and, indeed, involve what is probably the most common situation in death qualified juries. There are thus facts or questions of law that cannot adequately be presented by the parties and which are highly relevant to the disposition of the *Witherspoon* case, all

as is more fully set forth in the accompanying brief in support of this motion.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich

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BRIEF IN SUPPORT OF MOTION TO PARTICIPATE AS AMICUS CURIAE

The *Witherspoon* case presents the question whether it is proper to exclude from the jury in a criminal case all persons who have conscientious objections to the death penalty. *Witherspoon* arises in the context of an actual death sentence. But there is an important variant of this situation, the situation in which the death sentence is never seriously sought by the prosecution and the jury is not instructed concerning the death penalty. Here the device of death qualifying the jury serves only to exclude persons of a particular cast of mind from the determination of the defendant's guilt or innocence.

Mrs. Madden's case, now awaiting oral argument in the Supreme Court of Arizona under the number 1745, squarely presents the latter situation. Mrs. Madden was accused of murdering

her husband. There was no doubt but that in fact a gun which she was holding killed him. There was a substantial factual question as to whether the circumstances presented constituted accident or self-defense. The information charged first degree murder. On the strength of the information alone, the State was allowed to death qualify the jury. Eleven potential jurors out of a total panel of fifty-three were eliminated because of their objection to the death penalty. Express objection was made, carefully preserving the federal question, against stacking the jury with "hard headed ultra conservative" people.

There has in fact been only one woman given the death penalty in the history of Arizona, and on the circumstances of the particular case, with all of its doubts, it was inconceivable that this would be the second. The prosecution in fact withdrew the request for a death penalty before the matter went to the jury. The jury returned a verdict of second degree murder.

1. This Court can take judicial notice, from the experience of every Justice who has tried criminal cases, that the device of death qualifying a jury in cases in which in fact there is no real possibility of the death penalty is commonly used. The object can be put in the classical language of Jamesian philosophy, and be treated as a matter of segregating the "tough minded" from the "tender minded." But such classical language is not commonly used by lawyers in the midst of their trade. Here the reference usually is that, "We're going to get the bleeding hearts off the jury and have only the hard nosed left." The court rejected defendant's contention that prospective jurors opposing the death penalty should be subject only to peremptory challenge, stating:

> "I had this come up before. That may eventually be the law, but I am sure it isn't yet. So show that the defense objects to permitting the State to challenge for cause jurors who are opposed to the death penalty under any circumstances. Show that the objection is overruled."

2. Whatever the jargon, there is clearly a constitutional question under the Due Process and Equal Protection clauses of the

Fourteenth Amendment and under the Sixth Amendment as made applicable to the states by the Fourteenth Amendment whether a person's constitutional rights are taken from him when, in addition to its peremptory challenges, the State is given the power to exclude prospective jurors who are likely to bring a particular attitude, or opinion, or cast of mind as to the death penalty to the question of guilt or innocence in a nondeath case. The abuse might be regarded as particularly great in the nondeath cases, for here the only object of the death qualification is to prejudice the determination of guilt or innocence. The death qualification becomes simply a maneuver. Even in a case such as *Witherspoon*, where the jury may actually be called upon to impose the death penalty, we believe the practice of death qualification to be wrong. In the cases in which there is no such question to be decided, there is no possible basis for corrupting the free choice of a fair and impartial jury of one's peers by excluding that large portion of the population which has a particular view concerning the death penalty.

Mrs. Madden requests leave to file a brief amicus in support of the petitioner because the rights of persons in this second group of cases will almost certainly be settled by the Court's decision of *Witherspoon*. She asks to bring to the attention of the Court her point of view relating to the use of death qualified juries in nondeath cases. No other party before the Court has an interest of a similar nature.

3. Mrs. Madden also seeks leave to bring to the attention of the Court the possible existence of cases involving the death qualification issue other than *Witherspoon* in which records have been solidly made, so that such cases may not be prejudiced by an adverse determination of the issue of retroactivity. Because of the widespread comment in recent years concerning the continued utility and desirability of retaining the death penalty, the Court should, in the event that it rules in favor of the petitioner in *Witherspoon*, also apply that ruling to other cases presenting the

same question as to which, at the minimum, the remedy of direct appeal has not yet been exhausted.

CONCLUSION

It is respectfully submitted that Mrs. Madden should be permitted to file a brief amicus in this matter in support of the position of the petitioner in this cause.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich

March, 1968.

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF REBECCA B. MADDEN AS AMICUS CURIAE

Opinion

This is a certiorari to the Supreme Court of Illinois, to review a decision reported at 36 Ill. 2d 471, 224 N.E.2d 259. Other opinions concerning petitioner appear at 27 Ill. 2d 483, 190 N.E.2d 281 (1963) (death penalty affirmed), and 337 F.2d 427 (7th Cir. 1964) (determination by district court that petitioner was entitled to be resentenced reversed and habeas corpus petition dismissed). Other, unreported, proceedings are set forth in the opinion of the Supreme Court of Illinois. 224 N.E.2d at 260-61.

Jurisdiction and Statutes Involved

Amicus adopts petitioner's statements of jurisdiction and of

the constitutional provisions, treaties, statutes and ordinances, and regulations which the case involves.

Question Presented

Whether the operation of the Illinois statute providing that the State could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprived petitioner of a jury which fairly represented a cross section of the community and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Statement

Amicus adopts the statement of the case contained in the petitioner's brief. There are, however, other factual situations to which the Court's attention is called that should be taken into consideratoin by it in its determination of the death qualification issue in the *Witherspoon* case.

The first such circumstance relates to the type of case in which there is no substantial possibility that the jury will return a death penalty but in which, nevertheless, the death penalty is sought as a means of obtaining a jury that will be more likely to return a guilty verdict. The *Madden* case, now pending before the Arizona Supreme Court (No. 1745), is typical of a case presenting such circumstances. The trial testimony in *Madden* revealed a background of excessive drinking by the husband, beatings and abuse administered by him when he was drinking, with the result that Mrs. Madden had obtained a divorce and the custody of their only child. The *Madden* record showed, without contradiction, that Mrs. Madden carried a shotgun with her for protection in the wild country near the Superstition Mountains where she was living and that there had been disputes concerning child visitation.

The trial court overruled defendant's objection to permitting the State to challenge for cause jurors opposed to the death pen-

alty under any circumstances. Thereupon a total of eleven jurors were excused for objection to the death penalty out of a total panel of fifty-three. As a result of the exercise of the State's challenges for cause, no one was on the jury who was unwilling to inflict the death penalty. Numerous prospective jurors who could not do so had been eliminated. Yet, at the end of the case, the prosecuting attorney did not ask for the death penalty, the jury was not instructed concerning it, and, although the jury was instructed over defendant's objections concerning first degree murder, a verdict of second degree murder was returned.

The other factual considerations that should be before the Court concern the possible retroactive effect of a determination in favor of petitioner. The *Witherspoon* case itself presents the question of retroactivity, since the case is here on collateral attack of a conviction affirmed in 1964. The Illinois Supreme Court stated that petitioner contended, for the first time, in subsequent habeas corpus proceedings that the disqualification for cause of jurors having scruples against capital punishment violated his right to a trial by a jury which was fairly representative of a cross section of the community and subjected him to trial by a jury which favored the prosecution in deciding the issue of guilt or innocence. 224 N.E.2d at 262. In *Madden,* and in perhaps other cases now awaiting decision on appeal, the issue of the propriety of disqualification of jurors for cause who have such scruples against capital punishment was squarely raised prior to trial and on appeal. To the extent that the Court holds that there can no longer be disqualification for cause of jurors opposed to capital punishment, the holding should extend, at the minimum, to cases in which the issue was raised at trial, preserved on appeal, and as to which there has as yet been no exhaustion of direct appellate review.

These facts are brought to the attention of the Court for the purpose of rounding out the picture presented in *Witherspoon. Witherspoon* is the case of an actual death sentence from a death

qualified jury. But the Court, in deciding this question, will necessarily have before it the situation of the death qualified jury where the death qualification is for tactical purposes only and there is no actual likelihood that the death penalty will even be asked for.

Summary of Argument

The systematic exclusion from the jury for cause rather than by peremptory challenge of all persons who object to the death penalty denies to a defendant equal protection of the laws under the Fourteenth Amendment of the Constitution, due process of law under that same amendment, and further denies a trial by an impartial jury under the Sixth Amendment. To give to the prosecutor the sole discretion to obtain a death qualified jury denies to defendant equal protection since a death qualified jury is basically different from one that is not so qualified.

Use of death qualified jury has two constitutionally significant faults: (1) The process of death qualification deprives the defendant of a significant cross-section of the community of prospective jurors; and (2) the prosecution is allowed to fill the jury box with jurors who are, consciously or unconsciously, prosecution oriented to such a degree that they are in fact biased against the defendant, not only as to punishment, but, more important, as to guilt.

Although the practice of death qualification has developed in virtually all of the states, the death qualification is not constitutional and the authorities permitting it should be overruled. The contention that a juror with conscientious scruples against capital punishment is unable to determine whether a defendant is guilty or innocent is fallacious. Moreover, one cannot assume such a fixity of conviction on the part of a juror concerning the death penalty as an immunity from changing his mind. The essence of the jury system is the interchange of ideas among the jurors and the persuasion by those who can accept the penalty of those who cannot that it should be imposed in a particular case. In any event, how-

ever, in view of the historic function of juries to cause development of law where jury resistance makes a particular manner of proceeding impossible, a de facto abolition of capital punishment by jurors unable to impose it is not automatically objectionable.

The vice of death qualification is that it deprives a defendant of a jury representing a true cross section of a community and results in the obtaining of a jury actively prejudiced against the defendant on the question of guilt. Sociological studies and writings of trial attorneys confirm that death qualified juries are inclined to be more authoritarian than jurors excused from duty because of death scruples and that death qualification tends to eliminate jurors most capable of evaluating verbal evidence and arguments.

The practice of death qualification squarely conflicts with the defendant's constitutional right under the Sixth Amendment to the right to a trial by an impartial jury. The exclusion of fifty percent of the population who do not believe in the death penalty operates to deny the impartiality and a jury of one's peers guaranteed by the Sixth and Fourteenth Amendments. The death qualification also denies equal protction of the laws in that the cross section of the community represented by the jury is not a valid cross section. Numerous authorities proscribe the exclusion of prospective jurors by class.

Even in a case where there is some actual likelihood or possibility of the death sentence being imposed, a juror should not be excused for cause because he is opposed to the death penalty. Such disqualification only gives the prosecution extra challenges not available to the defendant. However, in cases where, after a death qualified jury is obtained, the prosecution does not then ask for the death penalty the practical result is that the prosecution is able to obtain a jury of the desired mental complexion and to purge the jury of persons it does not want, first by peremptory challenge, and second for cause. If the prosecution desires to utilize its peremptory challenges to exclude persons opposing the death

penalty, it certainly is entitled to do so. But the practice of death qualification permits the court to do the striking for the prosecution and to give it additional exclusions that are not available to the defense. This bonus is no longer logically or legally justifiable.

Sociological studies demonstrate that the elimination of even one potential juror of a particular point of view may very radically affect the jury's decision as to the question of guilt or innocence. Particularly in cases where the guilt or innocence of the defendant is in doubt, the defendant should be entitled to a jury that is willing to consider impartially all of the evidence before it. The requirement that a defendant must have a fair and impartial trial does not permit a trial by a jury loaded against the defendant by exclusion of the tender minded. To the extent such persons constitute a cross section of the community, they should be included on jury panels; the prosecution, if it believes them to be undesirable members of the jury, should utilize its peremptory challenges to remove them, rather than having the court exercise its challenges for cause.

The *Witherspoon* case also presents the issue of the extent of retroactive application of a holding that the death qualified jury is no longer constitutionally permissible. Petitioner should, of course, be given the full benefit of such a ruling. Beyond that, however, the ruling should extend at a minimum to others situated in Mrs. Madden's position who have not as yet exhausted their remedy of direct appellate review. It should also be extended to those whose convictions have become final, since the prejudice resulting from a death qualified jury goes to the heart of the fact-finding process.

ARGUMENT

I. *The Systematic Exclusion from the Jury for Cause Rather than by Peremptory Challenge of Persons who Object to the Death Penalty Denies the Constitutional Rights of the Defendant.*

This jury in the *Witherspoon* trial was what is technically known as DQ—it was Death Qualified.* This function was performed for the prosecution by the court itself; the removal of those citizens to whom the death penalty is abhorrent was made "for cause," without using any of the State's peremptory challenges. Where a "tough" jury is impaneled, all other questions in the case are to be determined by persons of a particular mental makeup.

The selection of a Death Qualified jury (hereafter a DQ jury) operates not only to eliminate from the jury those with a Death Scruple (hereafter DS) but that it does much more. A DQ person is a different kind of person from a DS person for more reasons than this difference alone; other differences intertwine with this one. A DQ jury is "tough" in many ways other than in its willingness to give a death penalty. This constitution of a jury deprives a defendant of equal protection of the laws under the Fourteenth Amendment of the Federal Constitution and denies a trial by an impartial jury under the Sixth Amendment, as well as "due process of law" under the Fourteenth. The utilization of DQ procedures, depending solely upon whether a prosecutor announces in advance that he contemplates asking for a death penalty deprives a defendant of equal protection in that persons charged with similar crimes but not faced on voir dire with the death penalty are given access to a basically different type of jury than other defendants.

* A DQ jury may be distinguished from a jury containing persons who object to the death penalty, and this has been referred to as a DS (Death Scruple) jury. We use these terms in this brief, following usage of Robert F. Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors* (Ph.D. thesis, Western Reserve University, 1966), hereafter referred to as Crosson.

Not only does the death qualification of a jury deprive a defendant of a significant cross-section of the community of prospective jurors; it also—as we shall presently show—allows the prosecution to fill the box with jurors who are, consciously or unconsciously, prosecution oriented to such a degree that they are in fact biased against the defendant, not only as to punishment, but, more important, as to guilt.

A. *Development of the Practice of "Death Qualification" of Jurors.*

The first statutes assessing capital punishment in the United States did not provide for alternative modes of punishment — a finding of guilt required a punishment of death.* Under such a statutory scheme, the juror who had conscientious scruples against the imposition of the death penalty was inherently unsatisfactory as a juror in a capital case since his scruples in regard to capital punishment would impinge upon his ability objectively to determine guilt. Such jurors were known to have refused to find guilt where the evidence supported such a result because a guilt finding violated their conscientious scruples against imposing the death penalty. In order to preclude such jurors from subverting the jury's sworn obligation to determine guilt or innocence according to the evidence in the case, the practice of "death qualifying" the jury developed. This practice allowed the prosecutor to challenge *for cause* any juror who had conscientious scruples against the imposition of the death penalty. Many jurisdictions enacted statutes disqualifying jurors in capital cases who had such conscientious scruples.** Where such statutes were not enacted, the same result was reached through judicial interpretation. Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U.Pa. L. Rev. 1099, 1106 (1953), hereafter cited as Knowl-

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* Bye, *Recent History & Present Status of Capital Punishment in the United States,* 17 J. Crim. L. 234, 236 (1962).

** In Arizona, the present-day counterpart of an earlier statute of this type is found in Arizona Rule of Criminal Procedure 219 A (14).

ton. Many state legislatures also amended their statutes which required capital punishment in all murder cases to allow the jury, in its discretion, to impose either the death penalty or life imprisonment.*

The leading authority on death qualification of jurors describes this development in the following words:

> "With the humanitarian trend away from capital punishment as a mandatory punishment for certain offenses, there was a broad-scale amending of statutes establishing capital crimes. The pertinent compromise adopted was one of watering down the automatic death sanction to the discretionary variety now in vogue. The discretion was placed in the jury. But the related challenge-for-cause statutory provisions were left in pristine form. The result in most capital jurisdictions is that, while the statute defining the particular crime empowers the jury to mitigate the penalty, the statute disqualifying jurors with scruples against the death penalty still speaks in terms of reservations against *conviction* rather than as to *punishment*." Oberer, *Does Qualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 Texas L. Rev. 545, 550-51 (1961), hereafter cited as Oberer. (Emphasis in original) (Footnotes omitted).

B. *The Death Qualification Practice is Not Constitutional. The Cases Permitting it Should be Overruled.*

The position we advance in this case conflicts with the weight of opinion the country over. For recent cases see *People v. Miller*, 53 Cal. Rptr. 720 (1966); *People v. Hobbs*, 35 Ill.2d 263, 220 N.E.2d 469, 472-73 (1966); *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118 (1966); *People v. Gilbert*, 47 Cal. Rptr. 909, 408 P.2d 365 (1965), and 48 A.L.R.2d 560. For a recent comprehensive review of federal cases reaching a result adverse to our

* Such statutes also divided murder into degrees. Knowlton, *supra* at 1102. Arizona law has provided for jury discretion on punishment since Territorial days. A.R.S. Sec. 13-452. However, the practice of death qualification of jurors received early approbation in *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948 (1906). Such approval has continued to date.

position, see *Pope v. United States,* 372 F.2d 710 (8th Cir. 1967). For a recent illustration of what we think is the wrong position, see *State v. Reynolds,* 43 N.J. 597, 206 A.2d 750, 753 (1965), holding that "a juror with conscientious scruples against capital punishment is obviously incapable of determining the appropriate punishment from the evidence at the trial."

This, we submit, is wrong. A juror with conscientious scruples against capital punishment can determine the appropriate punishment from the evidence at the trial. He can determine first that the defendant is guilty or innocent, and if guilty, he can assess the maximum imprisonment. Cases to the contrary of the majority are illustrated by *State v. Lee,* 91 Iowa 449, 502-03, 60 N.W. 119 (1894); *State v. Wilson,* 234 Iowa 60, 11 N.W.2d 737 (1943); *State v. Garrington,* 11 S.D. 178, 184, 76 N.W. 326 (1898) (dictum); see also *Boyington v. State,* 74 Fla. 258, 76 So. 774 (1917). *State v. Lee, supra,* was a murder case in which the jury had exercised its discretion by assessing the death penalty. On appeal the Supreme Court of Iowa was confronted with the contention that the trial court had improperly dismissed for cause three jurors with scruples against the death penalty. The court reversed the conviction, stating that though the latter was a "ground of challenge for implied bias" under an earlier Iowa statute, it had been omitted in a later statutory revision and thus was unavailable to the prosecution. The court added, by way of explanation:

> ". . . It cannot be said that the state is entitled to have the punishment by death inflicted in any case. The statute authorizes that punishment, in the discretion of the jury, when a person is convicted of murder in the first degree; but the state has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections." *Id.* at 502-03, 60 N.W. at 121.

In what must be the typical situation, none of the eleven jurors challenged for cause in *Madden* indicated that he could not fairly

and objectively determine the question of guilt. "Since a juror could impose life imprisonment, it is difficult to see how scruples against the death penalty could prevent convictions." Knowlton, *supra* at 1106. It is only after guilt has been determined that the jury's discretionary role as to punishment comes into play.

Moreover, one cannot assume such fixity of conviction on the part of a juror as an immunity from changing his mind. The judgment as to each and every juror cannot be made until all of the evidence is in. The whole function of juries, as a minute cross-section of the community, is to have an interchange of ideas. Those who can accept the death penalty may try to persuade their brothers who cannot and by the same token, those who cannot accept it can seek to persuade those who are willing to apply it. It is also said that to allow a person with a death scruple to sit on a jury would work a *de facto* abolition of capital punishment; see *Piccott v. State,* 116 So.2d 626 (Fla. 1959). We cannot regard this as automatically objectionable. One of the very good functions of juries, and one of its classic uses, is to cause development of law where jury resistance makes a particular way of proceeding impossible.*

C. *The Death Qualification of the Jury Deprives a Defendant of a Jury Representing a True Cross-Section of the Community.*

In the *Madden* case, eleven potential jurors out of a total panel of fifty-three were eliminated because of objection to the death penalty. This is, of course, too small to be a significant sample; we suggest that the country over the proportion might well be much larger. The death penalty itself is on the wane; the report of the President's National Commission on Crime is that during 1966

* Jury resistance to death sentences in criminal cases is precisely what caused the modification of the harsh penalties of 17th Century law, and a better century's work juries have never done. The phenomenon of jury attitudes towards particular offenses and their effect on law enforcement is considered analytically in Kalven and Zeisel, *The American Jury* 76 ("The jury's war with the law is now a polite one") and 286-97 (unpopular laws) (Little, Brown & Co., 1966).

only one person was executed in the United States. (Report, p. 143.) In 1965, sixty-seven persons were sentenced to death and sixty-two were reprieved. This decline reflects a popular attitude of opposition to the death penalty, as reflected in 1966 Gallup Poll figures which show that fewer than half the persons interviewed favored retaining it.

We, of course, acknowledge that not all persons who are opposed to the death penalty would refuse to apply it. But whatever the precise proportion is, the number is clearly so substantial that the elimination of them by a death qualification process is the elimination of a very large portion of the American population.

D. *Death Qualification of a Jury Actively Prejudices Defendants on the Question of Guilt.*

If the only matter involved in a death qualification were whether the death penalty was to be inflicted, the matter would not have the gravity which we attribute to it. In the *Madden* case, for example, no death penalty was ultimately asked of the jury, much less imposed, and in this sense the defendant was not hurt. Since, as we have shown, the number of death sentences the country over is almost negligible, if this were the only matter involved, it might be of small importance.

But more is involved. A death qualified juror not only has a particular attitude on the death penalty; he also has certain other related attitudes which affect his determination of the question of guilt or innocence. Jurors who have no conscientious scruples against capital punishment are prosecution oriented in that they are biased in favor of guilt.

In the *Madden* case, trial counsel as an experienced practioner knew what the prosecution was up to. He objected:

> ". . . We believe that is improper. And we would like to very briefly point out to the Court that we believe that if a prospective juror can bring in a death penalty in a case, as he certainly can in Arizona, he shouldn't be subject to a challenge for cause, but only to a peremptory challenge. We just think

that to do otherwise is to more or less pick a hanging jury. Most of us can agree, we think, as an abstract thought, that capital punishment—it is certainly my belief that most of us agree is not a wise policy. But we are faced with another right as a cold fact, that those liberal minded, intelligent jurors do have scruples against it. And the result in the end the most important criminal, or let's say murder cases, is that the jury consists of hard headed ultra conservative people. In fact, the defense has got to prove beyond all doubt. The necessity of proving guilt beyond a reasonable doubt is virtually abolished." T.A. 12-13.

Other trial attorneys have similarly commented on the subject in their writings. See McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania,* 30 Pa. B.A.Q. 252 (1959); Oberer, *supra* at 556.

What the lawyer knows from experienced instinct, the psychologist can demonstrate by study. In the doctoral thesis of Dr. Crosson, cited earlier, the questions are thoroughly considered. The Crosson study, though small, is a strong indication that death qualified jurors are inclined to be more authoritarian than jurors excused from duty because of death scruples. Death qualification tends to eliminate jurors most capable of evaluating verbal evidence and arguments. Willingness to impose the death penalty reflects a higher level of hostility than the unwillingness to do so. We attach an extensive quotation from Dr. Crosson's work as an Appendix to this brief. On the nature of the authoritarian personality, see *The Authoritarian Personality,* Adorno, Frenkel-Brunswik Levinson & Sanford (Harper 1950), which defines the term as including "extra-punitiveness." *Id.* at 405-14.

The Crosson conclusions are confirmed by the work of Dr. Cody Wilson, a social psychologist and education psychologist at the University of Texas. Based upon a study of two hundred young adults, he concluded flatly that "people who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant." *The Texas Observer,* Nov. 27, 1964, p. 5. He also found that such persons are more likely

to be biased against insanity as a defense. Again, the full statement is contained as an Appendix to this brief.

These conclusions are independently confirmed by work in the University of Chicago jury study. See report of study made by Dr. Hans Zeisel in the *National Observer,* August 30, 1965, p. 5:

> "Mr. Zeisel interviewed 1,248 jurors in Chicago and Kings County (Brooklyn, New York). On the afternoon of the last day of each juror's term of service, the juror was asked about the decision he actually had made. Jurors were rated as 'defense-prone' or 'prosecution-prone' on the basis of several criteria. The principal factor was a comparison from the juror's vote on the first ballot in a case with the vote of his fellow jurors. Mr. Zeisel then tried to determine what characteristics of jurors show a 'decisive correlation' with 'prosecution proneness'. He found just one such characteristic: lack of scruples about giving the death penalty. According to his figures, jurors who have no such scruples are about 28 percent more prosecution-prone than those who have 'major scruples' against the death penalty."

In short, the death qualification procedure locks out persons who in terms of their whole mental makeup are most likely to take the most open-minded approach to the whole task at hand. That is undoubtedly why the procedure is followed in cases in which there is no intention at all of actually asking for a death penalty.

E. *Death Qualification Conflicts with Constitutional Rights.*

(a) *Sixth Amendment Rights:*

As the Supreme Court has recently noted:

> "[The] Sixth Amendment [is] made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury—. . .'" *Parker v. Gladden,* 385 U.S. 363, 87 Sup.Ct. 468, 470, 17 L.Ed. 2d 420 (1966). See also *Turner v. Louisiana,* 379 U.S. 466, 472-73, 85 Sup.Ct. 546, 550, 13 L.Ed.2d 424 (1965).

This right to an impartial jury was thought by Thomas Jeffer-

son to be one of the handful of "principles [which] form the bright constellation that has gone before." Jefferson's First Inaugural Address, March 4, 1801. Moreover,

> "the very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

The death qualification practice flatly conflicts with these standards. A person is entitled to be tried by a jury of his peers. In any given case, a very large portion of the people of the United States, the peers of the defendant, believe that the defendant should not be executed. The exclusion of all those persons leaves a fifty percent peerage at best. The law of "impartiality" under the Sixth Amendment is so intertwined with the principles of equal protection under the Fourteenth that we incorporate herein our Fourteenth Amendment discussion immediately following. As is fully developed there, the exclusion or preference of particular classes in the society of potential jurors can violate the Fourteenth Amendment. The matter is by no means limited to race, religion, or ethnic inclusions or exclusions. When the question arose as to whether a person could be charged with dope peddling before a jury composed entirely of Government employees, the Court held first, that there was no showing that the panel had been composed heavily of Government employees except by chance, and second, that the defendant had contributed to the composition of the jury himself. *Frazier v. United States*, 335 U.S. 497, 69 Sup.Ct. 201, 93 L.Ed. 187 (1948). The Court majority interpreted impartiality "as a state of mind." Four dissenting Justices found, even in those circumstances, "a one-sided outlook on problems before it." The dissenters believed that there was no use in giving the two sides equal peremptory challenges when "the cards were stacked from the beginning." See also *Dennis v. United States*, 339 U.S. 162, 70 Sup.Ct. 519, 94 L.Ed. 734 (1950), another Government employee case under different circumstances, in

which Justice Black in dissent used words we think highly applicable:

> "Nor should the Government want such an unfair advantage. Of course this advantage makes convictions easier. That is precisely what the Sixth Amendment was designed to prevent. It commands impartiality in the jury-box." 339 U.S. at 180.

See also *Labat v. Bennett,* 365 F.2d 698, 727 (5th Cir. 1966), a case involving the exclusion of classes of manual laborers from the jury. There such a "systematic exclusion" deprived "the petitioners of an impartial jury, a cross-section of the community, in violation of the due process and the equal protection clauses of the Fourteenth Amendment." As was developed fully previously and as is even more fully developed in the Appendices, death qualified jurors are not "impartial"; they are biased in favor of the prosecution, at least as compared with a true cross-section of the community.

(b) *Fourteenth Amendment Rights*

The death qualification system denies equal protection of the laws. It excludes a significant segment of the community so that the jury, as finally constituted, is not a valid cross-section. Under the Equal Protection Clause, selection of the jury in such a manner is wholly improper:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." *Smith v. State of Texas,* 311 U.S. 128, 130, 61 Sup.Ct. 164, 165, 85 L.Ed. 84 (1940).

See also *Billingsley v. Alabama,* 359 F.2d 13, 16 (5th Cir. 1966):

> "[T]here is no expressed constitutional provision as to the classes of persons entitled to render jury service . . . the law does require that qualified persons not be excluded from jury service on a class basis. Systematic and purposeful exclusion of qualified persons cannot be reconciled with the American concept of an impartial trial."

Amicus does not seek "a perfect mirror of community nor [one which] accurately reflect[s] the proportionate strength of every identifiable group." *Swain v. State of Alabama,* 380 U.S. 202, 85 Sup.Ct. 824, 13 L.Ed.2d 759 (1965). She simply seeks to have some jury representation from a readily identifiable significant segment of the community and to be free from an arbitrary and invidious procedure.

> "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted." *Glasser v. United States,* 315 U.S. 60, 85-86, 62 Sup. Ct. 457, 86 L.Ed. 680 (1942) ("cross-section of the community . . ."; representative group required).

Earnest objectors to the death sentence are "fenced out" from jury duty in the same manner as voters were unconstitutionally fenced out by exclusion of military personnel. *Carrington v. Rash,* 380 U.S. 89, 94, 85 Sup.Ct. 775, 13 L.Ed.2d 675 (1965).

The rule against exclusion by class is represented by the race cases, *Eubanks v. State of Louisiana,* 356 U.S. 584, 78 Sup. Ct. 970, 2 L.Ed.2d 30 (1958), but the very same principles apply to any other category of exclusion which interferes with obtaining a representative jury. For discussion of other elements required to make the cross-section, see *Ballard v. United States,* 329 U.S. 187, 192-93, 67 Sup. Ct. 261, 91 L.Ed. 181 (1946). As illus-

trations of other areas where exclusion of a class has been held to contravene the principle that the jury must represent a cross-section of the community, see *Labat v. Bennett,* 365 F.2d 698, 727 (5th Cir. 1966) (manual laborers, outside workers, artisans, and earners making a daily wage); *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (leading case on inclusion of women on state juries); *Hernandez v. State of Texas,* 347 U.S. 475, 74 Sup. Ct. 667, 98 L.Ed. 866 (1954) (Mexicans); *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965) (atheists, agnostics or adherents to Oriental sects); *State v. Madison,* 240 Md. 265, 213 A.2d 880, 885 (1965) (member of "Apostolic Faith" sect could challenge unconstitutionality of exclusion from his jury of atheists, agnostics and believers in Oriental religions); *Juarez v. State,* 102 Tex. Cr. R. 297, 277 S.W. 1091 (1925) (Catholics).

Women, we suspect, are more likely than men to object to the death penalty; death qualification is to that extent a discrimination against women. Religion is more than a matter of faith, it is a matter of intellectual commitment, and some religions are particularly opposed to man-made death. The rule operates necessarily as a discrimination against this cross-section of the community, and thereby denies equal protection of the laws. And it operates as a discrimination against petitioner, who has a constitutional right to be free from discriminatory class exclusion in the selection of the jury empaneled to try his case.

F. *The Blue-Ribbon Concept; Herein of Fay v. New York, 332 U.S. 261, 67 Sup. Ct. 1613, 91 L. Ed. 2043 (1947).*

The leading United States Supreme Court case of specially constituted juries is *Fay v. New York, supra,* the New York Blue-Ribbon Jury case. Under the New York system, a general jury panel was created. From the general jury panel, a special or blue-ribbon panel was drawn. For example, those who had been found guilty of misconduct by a civil court were excluded. One ground of the exclusion was for those whose conscientious opinions would not allow them to find a defendant guilty if the crime charged

was punishable by death.* The *Fay* petitioners attacked the blue-ribbon jury on the grounds that it was not drawn from a cross-section of the community and that certain biases inhered in that class from which it was drawn.

The Supreme Court, in a 5-4 decision, upheld the statute. The Court found "nothing in the standards New York has prescribed which, on its face, is prohibited by the Constitution." 332 U.S. at 272. The majority opinion noted that there had been no objection on this ground at the trial court level, 332 U.S. at 282. It also held that it would not impose federal standards upon the composition of trial court juries except in extremely limited situations. Nonetheless, the opinion makes clear that elimination of a class, whether by policy or by a practice of discrimination, over a long period of time, in a purposeful manner, is unconstitutional. The opinion reiterated that a proper jury system required an impartial cross-section of the community; there may be no system in which "courts are organized to convict," 332 U.S. at 294.

Four Justices dissented, emphasizing the requirements that a jury be "fairly drawn from a cross-section of the community," and that it be chosen on a "representative basis." The dissent found that "we can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof." 332 U.S. at 300.

We contend that under both the majority approach and the minority approach in *Fay*, a death qualified jury does not meet the test of being a cross-section of the community. We know more clearly now than we did twenty years ago of the prejudicial effects of this exclusion. The classes which are recognized by the equal protection clause are not static, and are subject to change. *Hernandez v. Texas*, 347 U.S. 475, 478, 74 Sup.Ct. 667, 98 L. Ed.

* It will be noticed that in the New York law the exclusion was not of those who would not apply the death penalty but of those who would not find a defendant guilty because of the death penalty, a distinction developed earlier in this brief.

866 (1954). The rule "applies to any identifiable group in the community which may be the subject of prejudice." *Swain v. State of Alabama, supra,* 380 U.S. at 205. Those who are stricken on a death qualified jury have now become so large a number and so substantial a group as to make them a class which cannot be excluded from juries.

II. *The Method and Effect of Discrimination in the Non-Death Sentence Cases.*

In cases like *Witherspoon,* there is at least an actual likelihood or possibility of the death sentence being imposed. But in many cases, the death qualification of the jury is purely for purposes of maneuver; the application for the death sentence is a sham, to be abandoned or not seriously pressed as soon as a jury of the desired mental complexion is achieved. The practical result is that the prosecution has two means of purging the jury of the people it does not want, the first by peremptory challenge, and the second for cause. The object of this strategy of the prosecution may be put in the classical language of Jamesian philosophy as a matter of segregating the "tough minded" from the "tender minded." But such classical language is not commonly used by lawyers in the midst of their trade. In their terms, "We're going to get the bleeding hearts off the jury and have only the hard nosed left."

If the prosecution wishes to use its peremptory challenges to exclude persons of this point of view, this is a problem for the prosecution. Peremptory challenge, may be arbitrary, for a good reason or a bad one. *Swain v. State of Alabama,* 380 U.S. 202, 85 Sup. Ct. 824, 13 L. Ed. 2d 759 (1965). But by death qualification the prosecution in *Madden* had the court do its striking for it by exclusions for cause. The prosecution is thus given an extra batch of exclusions that the defense does not have—the prosecution is able to make its strikes after the court has already stricken the tender minded because of their points of view.

The grant to the prosecution of this challenge for cause bonus

is no longer logically or legally justifiable. Under the common-law practice, challenges for cause of jurors were divided into two classes: principal challenges, or challenges for principal cause; and challenges to the favor. The principal challenge showed a cause which positively, or by necessary legal implication, disqualified the juror from sitting in the case. The challenge to the favor was grounded on circumstances raising a suspicion of the existence of actual bias in the mind of a juror for or against a party. Since a challenge for principal cause "imports absolute bias or favor [it] leaves nothing for the discretion of the court." 31 Am.Jur. *Jury*, Sec. 157, p. 138.

Grounds for challenge at common law for principal cause or for bias implied by law included having conscientious scruples against capital punishment in a capital case. (*Ibid.* and numerous cases cited in the historical discussion in this brief.)

We have previously demonstrated that, with the advent of jury discretion in determining punishment, the original reason for automatic presumption of bias against conscientious scruples jurors had no continuing validity. However, the common law "implied bias" resulting in a challenge for cause has been allowed to remain, despite the fact that it no longer has any legitimate function to perform.

A juror's conscientious scruples against the death penalty would not necessarily affect his ability to decide the guilt innocence question, which is the principal matter entrusted to the jury for determination. Whatever logical basis there may have been historically for the challenge for cause procedure, such no longer exists given the present statutory scheme. Thus it should no longer be continued.

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-46, 57 Sup.Ct. 177, 185, 81 L.Ed. 78 (1936).

In view of the tremendous leverage this procedure provides to the prosecution in a capital case, and the manifest unfairness it causes to the defendant, we submit that it should no longer be followed. The prosecution should be able to do its work and protect the legitimate interests of the State through use of the peremptory challenges provided it. The combination of unlimited challenges for cause with the ten peremptory challanges given by law to the prosecution gives to the peremptory challenges a multiplier-effect not intended by the statute authorizing them. For some analogous practical considerations created by this practice, see the discussion in the dissenting opinion of four Justices, *Frazier v. United States, supra.* The case, it will be recalled, dealt with Government employees on the jury and what it said there of the practical problems applies here as well:

> "The Government was confronted by no occasion to use any of its peremptory challenges to get rid of its adversary's employees. The defendant was. But if the defendant should try to use his challenges to excuse employees of the Government, he would dismiss one only to incur a probability of getting another. If he exhausted his challenges in this effort, it would still be futile, for no one claims he had enough to displace them all. It might not be wise tactics to show suspicion or disapproval of a class some of whom will have to sit anyway. Moreover, if he used his challenges as far as they would go to dislodge government servants, it would leave him helpless to challenge any of the non-government jurors, for which challenge he might have good reason." 335 U.S. at 518.

The elimination of even one potential juror of a particular point of view may very radically affect the question of guilt or innocence. The Chicago Jury Studies show that in 79 actual cases in which the jury's first ballot produced "not guilty" votes of three or less, the ultimate verdict in every case was "guilty." But where the original minority was four or five, hung juries were produced in 19 percent of the cases. Kalven & Zeisel, *The American Jury, supra,* p.462; Broeder, *The University of Chicago*

Jury Project, 38 Neb. L. Rev. 744, 747-48 (1958). Thus, two dissenting jurors are virtually certain to give in, while if they are joined by two more, the result may well be different.

All of which is to say that one juror may make a difference. A defendant is entitled to a fair and impartial jury, not one loaded against him by exclusion of the tender minded.

III. *The Court's Ruling Should Be Extended To The Petitioner Himself As Well As To Those Cases In Which The Death Qualification Has Been Preserved And The Remedy Of Direct Appeal Has Not Yet Been Exhausted.*

In addition to its determination whether, as a matter of prospective determination, the practice of challenging for cause all prospective jurors opposed to or having conscientious scruples against capital punishment must be terminated, the Court will have to determine, either in this case or some other, the question of the extent of retroactive application to be given a holding that the practice of death qualification of jurors violates a defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. The *Witherspoon* case itself raises the retroactivity issue, since the case is here to review the dismissal of a petition for habeas corpus following a conviction that was affirmed in 1964.

Beyond the *Witherspoon* facts themselves, however, the question is presented as to the effect of a ruling favorable to petitioner upon others, such as Mrs. Madden, who are similarly situated. The trial in the *Madden* case occurred in June, 1966. The death qualification issue was squarely raised at the trial and was ruled upon adversely to the defendant by the trial court. An appeal was promptly taken that has not yet been argued or determined by the Arizona Supreme Court. Presumably a number of other cases are in a similar posture as attacks upon the death penalty and the death qualification question have become more frequent. Still a third class of case is presented by those in which convictions have

become final either by failure to take an appeal or by affirmance of the conviction but where the contention might be available in a collateral post-conviction proceeding that the defendant was prejudiced by the empaneling of a death qualified jury.

If anyone is entitled to the benefit of a ruling that the practice of death qualification is no longer constitutionally permissible, the petitioner should be. As the Court recognized in *Stovall v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199 (1967), at a minimum petitioners who successfully bring their cases before the Court are to be given the benefit of the Court's ruling as "an unavoidable consequence of the necessity that constitutional adjudications do not stand as mere dictum."

In view of Mrs. Madden's participation in *Witherspoon* as an amicus, she too should be given the benefit of its decision. Beyond this fortuity, however, we submit that the Court's ruling should extend, at the least, to other persons similarly situated whose remedy of direct appeal has not yet been exhausted and who have properly preserved the death qualification issue, as well as those whose trials will occur following the Court's decision.

The Court's opinions regarding the retroactive application of its major decisions expanding the scope of a defendant's constitutional protections teach that where the rule in question affects "the very integrity of the fact-finding processes," and averts "the clear danger of convicting the innocent," the rule will be retroactively applied. *See Tehan v. United States ex rel. Shott,* 382 U.S. 406, 409, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966). *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), have been such cases. Other examples of decisions retroactively applied to convictions becoming final before their decision are *Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (right to transcript on appeal), and *Anders v. California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493

(1967) (standards concerning submission of an appeal by appointed counsel for determination of fundamental error).

Although "the Constitution neither prohibits nor requires retrospective effect" to be given a particular rule, *Linkletter v. Walker,* 381 U.S. 618, 629, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), the determination as to whether to apply a decision retrospectively is to be made by weighing the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Virtually all of the Court's rulings have been held applicable to cases where the remedy of direct appeal had not yet become final at the time of decision. *See, e.g., Linkletter v. Walker,* 381 U.S. at 639-40 (*Mapp v. Ohio* held applicable to decisions not yet final as of the date of its decision); *Tehan v. United States ex rel. Shott,* 382 U.S. at 409 n. 3 (*Griffin v. California,* although not applicable to those cases in which appeal has been exhausted, assumed without question to be available to cases still pending on direct review at the time it was announced). In *Johnson v. New Jersey,* 384 U.S. 719, 727, 86 S. Ct. 1772, 16 L. Ed. 2d 853 (1966), where the Court held *Escobedo* and *Miranda* applicable only to trials occurring after their decision, *Davis v. North Carolina,* 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966), was held to permit allegations of a failure to comply with the *Escobedo* and *Miranda* requirements to be made as part of a coerced confession claim which, under *Jackson v. Denno, supra,* would be retroactive. As the Court stated in *Johnson v. New Jersey,* 384 U.S. at 729,

> "We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

Applying the complex of factors set forth in the Court's retroactivity decisions, it is apparent that a rule declaring unconstitutional the practice of death-qualifying juries should, at a minimum, be made available to persons whose right of appeal has not been

exhausted. The number of cases where the death qualification issue has been properly preserved is, in all probability, quite small, certainly far smaller than the number of casses affected by such rulings as *Smith v. Arizona,* __U.S.__, 88 S. Ct. 111, __ L. Ed. 2d __ (1967), holding *Anders v. California, supra,* to be retroactive and thus reopening all appeals submitted for determination of fundamental error without complying with the procedural safeguards required by *Anders.*

For all of the reasons given in the preceding sections of this brief, the practice of the death qualification creates a greater prejudice than the admission into evidence of the fruits of an illegal search and seizure or a confession as to which the requirements of *Miranda* have not been met. While the latter evidence may in and of itself be perfectly reliable and truthful, the prejudice resulting from a death qualified jury goes to the heart of the fact-finding process, the manner in which the jury views the evidence submitted for its consideration. To hold that a defendant's right to counsel at trial or on appeal or his protection against the admission into evidence of a coerced confession is retroactive would indeed be nugatory if the greatest possible source of prejudice to the defendant, a jury chosen for its hard-nosed, prosecution oriented tendencies, was permitted, because of the nature of its members, to consider the evidence without having properly weighed the various inferences permissible from the testimony and exhibits before it. The nature of this prejudice is so extreme that it is entirely possible that many innocent persons have been convicted by a jury not persuaded, because of its psychological makeup, of the defendant's innocence. Such a possibility alone requires that the death qualification decision, as has been done with other Sixth Amendment rulings, be made fully retroactive, this assuring all such persons affected by this issue of a new trial before a jury fairly representing a cross-section of the community.

We recognize, however, that such an across-the-board retroactivity holding might well be said to have an adverse effect on

the administration of justice because of the number of new trials that might be required and because of the reliance on prior state procedure that has led to the virtually uniform practice of death qualifying juries in capital cases. There is no countervailing reason, on the other hand, to limit the ruling in *Witherspoon* purely to prospective application. In view of the substantial prejudice to a defendant, particularly in noncapital cases, resulting from the use of a death qualified jury, and because, where the remedy of direct appeal has not yet been exhausted, such trials would not have occurred in the too far distant past, there would be no insuperable obstacle imposed to the granting of new trials in cases where such death qualification had occurred, the record had been properly preserved, and the remedy of direct appeal had not been exhausted. Such a ruling would properly strike a balance between the competing needs of fairness to the defendant, prior standards, the availability of other safeguards, the integrity of the fact-finding process, the danger of convicting the innocent, and the effect of a retroactive ruling upon administration of justice. For these reasons, the Court in *Witherspoon* should make the specific determination that its ruling extends, at a minimum, to such persons.

CONCLUSION

It is respectfully submitted that the practice of death qualifying juries violates the Fourteenth Amendment, regarded as an expression of the Sixth Amendment, or regarded as a matter of due process and equal protection. It is said that the application of these constitutional principles will as a practical matter put an end to the death penalty in the United States. If the death penalty can continue its barbarous existence only by excluding enormous numbers of conscientious citizens from juries, then it has existed too long.

Respectfully submitted

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich

March, 1968.

APPENDIX A.

Excerpt from Doctoral Dissertation of Robert F. Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors*, Western Reserve University, 1966.

VI. SUMMARY AND CONCLUSIONS

Summary

In 1961, Walter Oberer, writing in the *Texas Law Review*, examined a juridical matter having serious implications for fair trial observance in capital cases in those states where the death penalty may be levied. In this and a later article Oberer argued that because the jurors impanelled for service in capital trials cannot entertain any reservations with respect to the death penalty—that is, they must be "death qualified" to the satisfaction of the court—the defendant is faced with an inordinately antipathetic jury whose impartiality toward a possible sentence of death may supersede the more important issue of guilt or innocence. McClelland, another attorney who has served as both prosecutor and defense at various times in his career, puts the case even more strongly. He believes that a death qualified jury "consists of hard headed, ultra conservative people, and . . . the defense must prove innocence beyond all doubt" when the burden of proof should lie with the state. The capital jury, so death qualified, is alleged to be composed of people whom Oberer describes as "authoritarian personalities." Such a jury, it is argued, threatens the right of the capital defendant to a fair and impartial trial.

The present study undertook to investigate certain personality variables, including authoritarianism, in two groups of jurors: jurors who had served in capital trials and were therefore death qualified (DQ); and jurors who had served in non-capital cases and who professed scruples against the death penalty (DS).

Thirty-six jurors for each group were selected randomly from jury lists provided by the office of the Clerk of the Court of Common Appeals, Criminal Branch, County of Cuyahoga, Ohio.

The jurors subjects of each group were contacted by letter initially explaining that a "survey of critical issues" was being conducted by the University and that only responsible, civic-minded citizens, viz. jurors, were being surveyed. Following the letter a telephone call was made to the subjects and an appointment arranged with cooperating respondents. For the non-capital jurors contacted a death scruples screening had to be added in the telephone contact to insure exclusion of non-capital jurors who might be eligible for death qualified capital juries. The selection continued until the DQ and DS groups numbered 36 each.

The literature was reviewed relative to the psychosociological research on juries and jury functioning. It was shown that little jury investigation has been undertaken, with the notable exception of the Chicago Jury Project, and that no work has been done which approaches the problems posed in the present study.

The variables tested in this study, and the instruments used, were: 1) dogmatism, or closed-mindedness, or general authoritarianism, using the Rokeach Dogmatism Scale, Form E; 2) total opinionation, using the Rokeach Opinionation Scale, Form C; 3) political opinionation, using the Rokeach Conservatism-Liberalism subscale of Form C; 4) critical thinking with three subtests of the Watson-Glaser Critical Thinking Appraisal, Form AM; and 5) manifest hostility, utilizing the Siegel Manifest Hostility Scale.

Mean test scores were computed for each group and the difference between group means for each variable were tested for significance using the critical ratio method. Because a possible sex frequency differential might be confounding the results, a second set of critical ratios was performed to test dif-

ferences between male and female jurors from both groups. And finally intercorrelations of test scores were calculated for DQ and DS subjects.

The results supported the contention that rightist authoritarians (conservatives) are significantly more prevalent among death qualified jurors. There was also some evidence, though weak, that death scruples jurors are better able to think critically and evaluate verbal arguments than death qualified jurors. All but one of the variables showed differences between the juror groups in the expected direction. Sex differences in two of the variables (total opinionation and conservatism-liberalism) were significant and helped to explain some of the differences between the DQ and DS groups, but did not substract from the importance of the empirical differences between the juror groups. Some of the intercorrelations helped to clarify reasons for differences and similiarities between the groups.

Conclusions and Remarks

The opinions expressed by Oberer and McClelland were rationally developed as a result of their long experience in observing and working with jurors. The did not have the advantage of empirical findings which psychological or sociological research might have provided regarding personality characteristics of jurors. The present study represents the first attempt to examine personality variables among jurors, and although the investigation has been limited and circumscribed it has, hopefully, provided some empirical support for the opinions expressed by a few students of law regarding certain characteristics of death qualified capital juries.

Apart from this study's results pertinent to differences between DQ and DS jurors, the writer proposes to comment on other implications of this research which bear on the law as he sees the law. The writer professes no competency in the law and up to this point heavy reliance had been placed on the opinions and

discussions of the law relevant to juries as given in legal journals and articles. The following remarks are made without expertise in legal matters. Nevertheless there are aspects of the findings in this research which will bear more comment and which impinge on certain judicial areas as this interested citizen and researcher sees them.

In a democratic society, and under the American constitution, a "jury of peers" is a fundamental ideal. Practical considerations, however, serve to reduce the chances for wide citizen representation on juries. Jury exemption is one of these considerations (see Appendix A). Interested students might ask whether justice would be better served in a system where greater representation of the citizenry is included in juries, or whether competency requirements be made a part of jury selection. These are not new questions. Legal writers have considered the problems for a long time and at least one social scientist has grappled with the juror competency issue (James, 1959a), but the latter focused on relative competency levels within existing jury compositions.

Another question in jury selection has to do with whether the present system should be adjusted so that the full range of personalities in jury pools have equal likelihood of selection on all juries. It is this question to which the present study was related. Death qualification for capital juries is claimed by some to be a biasing factor against the defendant, a claim which receives support in the present research. Capital punishment is facing abolition in the thirty-seven states where it still exists. The gradual trend among the retaining states has been *de facto* abolition. The *de facto* status of capital punishment (only 21 executions in the nation in the last year) (1964) makes the death qualifier increasingly anachronistic and unnecessary. In the years until the death penalty is abolished, and in those "abolitionist" states where capital punishment is reserved for certain instances of murder (e.g., New York State, where recent legislation abolished the death penalty except in cases of murder of policemen or

prison guards) the voir dires for capital crimes might at least be freed of death qualifying restrictions. The finality of the death sentence makes normal human frailty in the jury box especially critical. If anti-authoritarian traits are as likely to be represented on the jury as authoritarian traits, then the results of this study suggest that removal of the death qualification from the capital voir dire would be a step in the direction of fairer representation which might better serve justice instead of just the prosecutor.

APPENDIX B

Professor Cody Wilson, University of Texas psychologist and sociologist, "Impartial Juries?" *The Texas Observer,* Jan. 15, 1965, p. 5.

IMPARTIAL JURIES?

Cody Wilson

Austin

Texas is one of several states that provide for "death qualification" of juries that hear and render decisions in "capital" cases. That is, in order to serve on a Texas jury that hears a case concerned with rape, murder, kidnapping, or armed robbery, a person must believe in capital punishment.

Professor Walter Oberer, formerly of the University of Texas law school, raised the question, in an article in the Nation last spring, whether such practices constitute a denial of fair trial to the defendant on the issue of guilt. He drew two conclusions, that the question had never been squarely presented to any court, and that due process is not a static concept, so that when the issue is presented, the testimony of expert witnesses from psychology may be relevant.

The question Oberer raises is a legal one and can be answered only by the courts. But behind the legal question lies a psychological one: Do people who believe in capital punishment differ from people who have scruples against capital punishment in other psychological characteristics so that a jury composed only of people who believe in capital punishment would be biased against the defendant?

In an effort to answer this question, and thereby perhaps to help the courts answer theirs, a research team of lawyers and psychologists at the University of Texas has gathered information from more than 200 adults, mostly junior and senior college students. Five capital cases were simulated; brief written descrip-

tions were prepared of the facts presented to the jury in each case. Each person was asked to assume, in each of the five cases, that he was a member of the jury and to reach a decision of guilt or innocence. He was asked to indicate the degree of confidence that he had in each of his decisions. He was asked the question the answer to which forms the basis of a "challenge for cause" in a capital case, "Do you have conscientious scruples against the death penalty, or capital punishment for a crime?"

Each person was also asked to agree or disagree with a series of statements, of which these are examples:

"The district attorney's interpretation of the facts in a criminal case is usually more reliable than the defense lawyer's."

"If two witnesses gave conflicting testimony in a criminal case, I would probably believe the witness for the prosecution rather than the witness for the defense."

"If I were a member of a jury, I could never vote 'not guilty' for a man whose defense was insanity."

"The plea of 'not guilty by reason of insanity' is a loophole that allows many criminals to escape punishment."

The number of statements similar to the first two that the subject agreed with was used as a measure of the tendency to be biased in favor of the prosecution. The number of statements similar to the latter two that the subject agreed with was used as a measure of the tendency to be biased against insanity as a defense plea.

Finally, each person was asked to assume the jury had agreed upon a verdict of guilty in each of the simulated cases. Now he was asked to recommend an appropriate punishment. The allowable punishments ranged from suspended sentence to life imprisonment but did not include the death penalty.

The research showed that people who believe in capital punishment differ from those who have scruples against capital

punishment in several characteristics related to jury performance:

(1) People who believe in capital punishment are more likely to judge guilty in response to the cases than are people who do not believe in capital punishment;

(2) People who believe in capital punishment are more confident of the correctness of their judgment of guilt and innocence;

(3) People who believe in capital punishment are likely to assess a more severe punishment—even without the death penalty —than are people who have scruples gainst capital punishment.

(4) People who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant; and (5) People who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment.

If we assume that the observed relationships hold among the adult population at large (and there is no reason for thinking that they would not), then we may conclude that a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being more likely to bring a verdict of guilty, being more confident of this decision of guilty, favoring the prosecution in opposition to the defense, being hostile toward the plea of not guilty by reason of insanity, and assessing a more severe punishment when the death penalty has been excluded from consideration.

If the existence in juries of such systematic biases against the defendant constitutes denial of fair trial, then we are violating one of our most cherished legal traditions with our current jury selection procedures in Texas. The person accused of a capital crime is not getting the fair shake to which we are all entitled.